DEPARTMENT OF THE ARMY
HEADQUARTERS UNITED STATES ARMY FORCES COMMAND
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REPLY TO
ATTENTION OF

AFLG-PRO 25 Feb 98

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: *Contracting Information* Letter (CIL) 98-15, General Accounting Office (GAO) Protests

1. We provide the following GAO protests in their entirety due to the timely topics:

a. Montage, Inc. - Agency may exclude a defaulted contractor from a reprocurement

b. COMARK Federal Systems - Agency's failure to advise vendors of the agency's actual needs and evaluated quotes in a manner inconsistent with the solicitation

c. Scientech, Inc. - Agency's failure to consider past performance of the incumbent contractor and failure to consider cost or price in the competitive range determination

2. For additional information, please contact Irene E. Hamm, hammi@forscom.army.mil or 404/464-5632.

3 Encls

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Acting Chief, Contracting
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B-277923.2
DATE: December 29, 1997
Montage Inc.

DIGEST

An agency may properly exclude a defaulted contractor from a reprocurement for the remaining work in the defaulted contract; to the extent that PRB Uniforms, Inc., 56 Comp. Gen. 976, 978 (1977), 77-2 CPD para. 213, and cases following that decision, state that a contracting officer may not automatically exclude a defaulted contractor from the competition for a reprocurement, those cases will not be followed.

DECISION

Montage, Inc. protests the Department of the Navy's failure to solicit it in the agency's reprocurement of the replacement of the heating, air conditioning, and ventilation (HVAC) system in the PFC Curtis B. Schooley U.S. Army Reserve Center, Galax, Virginia.

Protest Denied

On March 13, 1996, the Navy awarded an indefinite delivery, indefinite quantity, multi-trade construction contract. On November 14, Montage received delivery order No. 0009 under this contract to replace the HVAC system at the Schooley Center within 180 days of the order. On June 12, 1997, the Navy terminated delivery order No. 0009 for default "due to Montage's failure to make progress in the work and for default in performance."

On June 17, the Navy offered this requirement as a sole source to Capitol Contractors, Inc., through the SBA's section 8(a) program. After Montage protested this intended noncompetitive award to GAO, the Navy cancelled its request for a section 8(a) award and decided to obtain competition to the maximum extent practicable by soliciting three sources, but did not include Montage.

Montage challenged its exclusion from the Navy's competition of the reprocurement and argued that limiting the competition to three sources did not satisfy the requirement that competition be obtained to the maximum extent practicable.

Generally, the statutes and regulations governing federal procurements are not strictly applicable to reprocurements of defaulted requirements. E. Huttenbauer & Son, Inc., B-239142.2 et al., Aug. 17, 1990, 90-2 CPD para. 140 at 2. Rather, the contracting officer may use any terms and acquisition method deemed appropriate for the repurchase; however, the contacting officer must repurchase at as reasonable a price as practicable and must obtain competition to the maximum extent practicable. Federal Acquisition Regulation (FAR) part
49.402-6(a), (b). The FAR provision allows the agency to purchase needed supplies and services as expeditiously as possible while preserving the government's right to seek excess reprocurement costs from the defaulted contractor.

To date, there have been no cases where GAO sustained a protest against a contracting officer's failure to solicit the defaulted contractor. However, GAO stated that a defaulted contractor may not automatically be excluded from a competition for the defaulted requirement because such an exclusion prior to

the submission of bids or proposals would constitute an improper premature determination of nonresponsibility.
See PRB Uniforms, Inc., 56 Comp. Gen. 976, 978 (1977), 77-2 CPD para. 213 at 3. More recently, however, GAO concluded that whether a defaulted contractor should be solicited depends on the circumstances of each case and that the contracting officer has a wide degree of discretion in this regard. For example, GAO upheld a contracting officer's determination not to solicit the defaulted contractor where the defaulted contractor declined to perform the contract requirements, such that the contracting officer reasonably concluded that the defaulted contractor could not and would not perform the contract. E. Huttenbauer & Son, Inc., supra, at 3. Also, GAO found that a contracting officer need not solicit a defaulted contractor where a competitive reprocurement was reasonably not conducted. See ATA Defense Indus., Inc., B-275303, Feb. 6, 1997, 97-1 CPD para. 61 at 3 (sole source order under the Federal Supply Schedule).

GAO's earlier statement that the automatic exclusion of a defaulted contractor from a reprocurement constitutes an improper premature determination of nonresponsibility reflected the regulations then in effect, which generally provided for reprocurement competitions within the context of general procurement statutes and regulations. Specifically, Armed Services Procurement Regulation (ASPR) sec. 8-602.6(b) (1976) provided that:

the PCO may use formal advertising procedures [although not required to do so]. If the PCO decides to negotiate the repurchase contract, he may either (1) use any authority listed in [ASPR] 3-201 through 3-217 (10 U.S.C. 2304(a)(1)-(17)), as appropriate, or (2) if none of those authorities to negotiate is used, the contract shall identify the procurement as a repurchase in accordance with the provisions of the Default clause in the defaulted contract.

Unlike the ASPR, the current regulation does not require the use of any particular procurement process but "authorizes the contracting officer to use any terms and acquisition method deemed appropriate for the repurchase." FAR part 49.402-6(b). Although agencies are required to "obtain competition to the maximum extent practicable for the repurchase," there is no requirement for full and open competition. Id.

Thus, contracting officers are invested with wide latitude to determine how needed supplies or services are to be reprocured after the default of a contract. In the absence of a countervailing law or regulation, such a broad grant of discretion necessarily includes determining, in view of the circumstances of the default, whether or not to solicit or allow the defaulted contractor to compete in the reprocurement. The agency, with its particularized knowledge of the contractor's past performance (or failure to perform) on the requirement being reprocured, is clearly in the best position to make that determination. Although "competition to the maximum extent practicable" must be obtained in the reprocurement, that standard does not, in GAO's view, mean that an agency must consider an offer from a defaulted contractor for the reprocurement of the very work for which it was defaulted. Accordingly, and in light of the broad authority accorded contracting officers by FAR part 49.402-6, GAO will not review an agency's decision not to solicit a defaulted contractor.

GAO's current view is consistent with that expressed in various board of contract appeals decisions reviewing agency's default terminations, which have long held that the contracting officer's broad discretion in conducting reprocurements includes the exclusion of the defaulted contractor from the

repurchase.[1] See, e.g., Zan Machine Co., Inc., ASBCA No. 39462, June 4, 1991, 91-3 BCA para. 24,085 at 120,542; Morton Mfg., Inc., ASBCA No. 30716, Oct. 31, 1988, 89-1 BCA para. 21,326 at 107,553; see also Edwards v. U.S., 22 Cl. Ct 411, 417 note 6 (1991).[2]

[T]he "general rule is that the Government is not required to invite bids on repurchase solicitations from a defaulted contractor." [Citations omitted.] The reasoning underlying this rubric would seem to be obvious: If the defaulted contractor had originally complied with its contractual obligations, the need to reprocure would never have arisen.

Morton Mfg., Inc., supra, at 107,553.

In sum, the agency did not abuse its discretion in excluding Montage from the competition of the delivery order for which it had been defaulted. To the extent that PRB Uniforms, Inc., supra, and other decisions citing that case state that a defaulted contractor may not be automatically excluded from the competition for the reprocurement of the requirement as to which it defaulted, those cases will not be followed.

Montage also complained that the Navy failed to obtain competition to the maximum extent practicable as required by FAR part 49.402-6. GAO conclused that the Navy properly excluded Montage from the reprocurement, Montage is not an interested party to raise this issue because, even if Montage's protest were sustained on this ground, the protester would not be eligible to compete for award. Bid Protest Regulations, 4 C.F.R. part 21.0(a) (1997); King Nutronics Corp., B-259846, May 3, 1995, 95-2 CPD para. 112 at 4. In any event, soliciting three sources, as was done here, would appear to satisfy the requirement for competition to the maximum extent practicable. See FAR part 13.106-2(a)(4).

Protest denied.

Comptroller General
of the United States

1. Although a contracting officer may need to consider soliciting a defaulted contractor, under certain circumstances, to preserve the agency's right to seek excess reprocurement costs under the Contract Disputes Act, whether excess reprocurement costs were properly mitigated is not a matter for consideration by our Office. See VCA Corp., B-219305.2, Sept. 19, 1985, 85-2 CPD para. 308 at 2.

2. The protester cites Tom W. Kaufman Co., GSBCA No. 4623, June 6, 1978, 78-2 BCA para. 13,288, for the proposition that "an agency must solicit the defaulted contractor where, as here, that contractor is the most suitable and readily available source for reprocurement." (Emphasis in original.) That decision specifically recognized, however, that generally the "government is not required to invite bids on repurchase solicitations from a defaulted contractor." Id. at 60,020. Rather, and as recognized by other boards of contract appeals, although an agency desiring to preserve its right to seek excess reprocurement costs against a defaulted contractor may have to solicit a defaulted contractor where the contractor will be able to deliver conforming supplies or services without delay, there is no absolute requirement that the defaulted contractor be solicited or awarded the reprocurement. Id.; see also Spectrum Leasing Corp., ASBCA Nos. 25724, 26049, Dec. 18, 1984, 85-1 BCA para. 17,822 at 89,200; Proven Profit Sys., Inc., GSBCA No. 5752-TD, July 31, 1981, 81-2 BCA para. 15,258 at 75,525-75,526.

COMARK Federal Systems,
B-278343; B-278343.2,
January 20, 1998

DOCUMENT FOR PUBLIC RELEASE The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

DIGEST

Under request for quotations (RFQ) that asked vendors to identify a configuration of computer systems and related hardware and services on Federal Supply Schedule, where agency intended to conduct a technical evaluation and cost/technical trade-off, agency improperly failed to advise vendors of the basis for selection.

DECISION

COMARK Federal Systems protested the issuance of a delivery order to Sytel, Inc. under RFQ, issued by the Health Care Financing Administration, Department of Health and Human Services, for computer desktop workstations. COMARK principally argued that the agency improperly failed to advise vendors of the agency's actual needs and evaluated quotations in a manner that was inconsistent with the solicitation.

BACKGROUND

In June 1997, the agency announced that it would issue multiple blanket purchase agreements (BPAs) covering a variety of computer hardware, software, associated equipment and services pursuant to the General Services Administration (GSA) Federal Supply Schedule (FSS). The agency tentatively identified six vendors to receive for review BPA "packages," which included, among other things, a sample personal computer specification, a document entitled "BPA Evaluation Requirements Criteria," and the agency's terms and conditions for future delivery orders to be issued under the BPA. The BPA package required the submission of a demonstration workstation to undergo a benchmark test and specified that the proposed unit have a hard drive capable of storing 1 gigabyte (GB) of data. In July, question and answer sessions were conducted and based on these sessions, as well as past performance evaluations, the agency selected four vendors, including COMARK and Sytel, to receive BPAs. On August 6, the agency revised the BPA specifications to require a hard drive capable of storing a minimum of 2 GB of data. Benchmark demonstrations were performed by the agency from mid-August through mid-September. As relevant here, COMARK's "Plus Data" unit, which it proposed to meet the BPA specifications, successfully passed the benchmark demonstration, as did two models from Sytel and two from another vendor, BTG, Inc. These three firms signed and accepted the BPAs on September 4.

On September 18, the agency issued RFQ No. 0008 to the three firms via electronic mail. The RFQ called for a quantity of 1,950 desktop workstations and specifically stated that it was being issued "under [the agency's] BPA." The BPA, in turn, specified that it was issued "[p]ursuant to GSA Federal Supply Contract[s]." The RFQ contained numerous specifications, some of which were followed by the parenthetical designation "(minimum)." Among the latter, the RFQ included a requirement for a "2 GB Hard Disk (minimum)." The RFQ also required a 3-year on-site warranty for all items. The RFQ did not contain any evaluation criteria.

From September 23 through September 29, the agency received quotes, which were rated on a 1,000-point system with eight categories, including system design, features, performance, and price (which accounted for [deleted] percent of the total score). COMARK submitted two quotes; the chart below reflects its lower-priced quote. The evaluation results contained a pricing error that significantly reduced COMARK's rating. The agency corrected them in its post-protest calculations. The total evaluated points includes both technical and price factors--that is, the scores reflect a combination of technical merit and price in a composite rating.

Based on the mistaken evaluation results (that is, results which, as noted above, assumed a significantly higher price and therefore a lower total evaluated score for COMARK), the agency's Project Officer made the following determination: Based on the quotations and the evaluation criteria, I recommend the purchase of the [Sytel] Dell system as a 'best value' decision. The Dell ranked highest on the [agency's] evaluation test in system design, system configuration and performance, as well as in overall scoring. It has a newer chipset [deleted] than the cheaper, and closest technically acceptable competitor, [deleted]. In addition, the [Sytel] Dell system has a [deleted] GB hard drive [versus] the 2 GB drive found on the less expensive machines. Accordingly, the delivery order was issued to Sytel on September 30, 1997. This protest followed. The protester argued that the RFQ was silent as to what evaluation criteria the agency would follow, and that the agency nevertheless improperly engaged in a "best value" procurement instead of selecting the low, technically acceptable quote.\1 The agency responded that best value determinations are permitted under the FSS. The RFQ specifically referred to the BPA, which, in turn, stated that it was issued pursuant to the GSA FSS. Accordingly, the provisions of Federal Acquisition Regulation (FAR) Subpart 8.4 apply. Those provisions anticipate agencies reviewing vendors' federal supply schedules--in effect, their catalogs--and then placing an order directly with the schedule contractor that can provide the supply (or service) that represents the best value and meets the agency's needs at the lowest overall cost. FAR part 8.404(b)(2) (June 1997).\2 When agencies review competing vendors' schedule offerings, they are permitted to make a best-value determination that takes into account "[s]pecial features of one item not provided by comparable items which are required in effective program performance." FAR 8.404(b)(2)(ii)(A).\3 When agencies take this approach, there is no requirement that vendors receive any advance notice, regarding either the agency's needs or the selection criteria. Agencies; however, may shift the responsibility for selecting items from schedule offerings to the vendors, by issuing solicitations (typically in the form of RFQs) that call on the vendors to select, from among the hundreds (or thousands) of possible configurations of the items on their schedules, a particular configuration on which to submit a quotation. It is certainly understandable that an agency would prefer for the vendors to construct these configurations; particularly in the area of information technology, the large number of possible combinations might make it difficult for agency personnel unfamiliar with the particular equipment or related technical issues to select one configuration by reviewing vendors' schedule offerings.\4 Yet once an agency decides, by issuing an RFQ (a procedure not mentioned in FAR 8.4), to shift to the vendors the burden of selecting items on which to quote, the agency must provide some guidance about the selection criteria, in order to allow vendors to compete intelligently.\5 Haworth, Inc.; Knoll N. Am., Inc., 73 Comp. Gen. 283, 286 (1994), 94-2 CPD ¶ 98 at 5. Where the agency intends to use the vendors' responses as the basis of a detailed technical evaluation and cost/technical trade-off, the agency has elected to use an approach that is more like a competition in a negotiated procurement than a simple FSS buy, and the RFQ is therefore required to provide for a fair and equitable competition. See EMC Corp., B-277133, Sept. 4, 1997, 97-2 CPD ¶ 64 at 3; L.A. Sys., Inc., B-276349, June 9, 1997, 97-1 CPD ¶ 206 at 3-4. While an agency need not identify

detailed evaluation criteria in an RFQ, even where it is asking vendors to select items from their schedules and where the agency intends to conduct a technical evaluation, it must indicate, at a minimum, the basis on which the selection is to be made, including whether the agency intends to select the low-cost technically acceptable quotation, or whether the agency is willing to consider paying a higher price for superior technical features (that is, whether it contemplates performing a cost/technical trade-off). In the field of information technology, where schedule contractors typically have a wide spectrum of items--from cut-rate to cutting-edge--on their schedules, an FSS vendor needs guidance from the agency in order to rationally decide which products to select in responding to an RFQ. To use an example drawing on the facts of this protest, when the agency is asking a computer vendor to decide whether to submit a quotation for a hard drive with a 2 GB storage capacity for a lower price, or one with a [deleted] GB capacity at a higher price--where both possibilities are covered by the schedule contract--the vendor cannot intelligently make that choice without guidance about the basis on which the agency intends to make its selection. In the multi-million dollar acquisition at issue in this protest, the agency intended to conduct a detailed technical evaluation and cost/technical trade-off, yet it asked vendors to submit quotations with less guidance than is required to be given in a solicitation for a far smaller purchase under the simplified acquisition procedures of Part 13 of the FAR. See FAR 13.106-2(a)(1) ("Solicitations shall notify suppliers of the basis upon which award is to be made."). Specifically, the agency apparently viewed the specifications set out in the RFQ only as a statement of the minimum it was willing to purchase, and it was willing to pay a higher price for greater technical capabilities. It failed; however, to advise vendors of that critical fact.

The agency suggests that the protester's challenge to the RFQ's failure to set out evaluation criteria should be dismissed as untimely, pursuant to 4 C.F.R. § 21.2(a)(1) (1997). We believe that the defect in the RFQ only became apparent when the protester learned that the agency's needs were not for selection of the low-priced, technically acceptable quotation (as the protester reasonably expected, as explained below). Similarly, we reject the agency's contention that the RFQ made clear, through the use of the word "minimum" next to certain specifications, that a best-value determination might be the basis of the source selection here. In GAO's view, the parentheticals in the list of specifications did not by themselves indicate the intended basis of selection, since they would have been consistent with either a lowest-price, technically acceptable approach or a best-value one. The protester contended that, on one of the two technical factors on which the selection decision rested, the capacity of the hard drive, it could have quoted an item equal in capacity to that quoted by Sytel. The agency does not deny that the protester's FSS contract includes such an item.\6 The protester contends that the reason that it did not quote a configuration with greater capabilities was that it understood the RFQ to mean that the agency's needs were for the low-priced, technically acceptable configuration. Such a reading of a solicitation that does not otherwise explain the agency's evaluation criteria was reasonable.\7 See Vistron, Inc., B-277497, Oct. 17, 1997, 97-2 CPD ¶ 107 at 4 (where a solicitation does not contain evaluation factors other than price, general rule is that price is the sole evaluation criterion). GAO concluded that the RFQ did not accurately state the agency's requirements and that the protester was prejudiced by the agency's action in this regard. Because the agency requested quotations from vendors without advising them that the agency did not require the low-priced, technically acceptable configuration, GAO sustained the protest. GAO recommended that the agency amend the RFQ to advise the firms holding BPAs of the agency's needs, including whether the agency is willing to conduct a cost/technical trade-off, if configurations are quoted that exceed the minimum specifications stated in the RFQ. If, upon reviewing quotations received in

response to the amended RFQ, the agency selected other than Sytel, GAO recommended that the agency cancel that firm's purchase order and issue a purchase order to the vendor selected. GAO also recommended that the protester be reimbursed the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1).

Protest sustained.

Comptroller General of the United States

NOTES
\1 COMARK also alleged that it was orally advised by a contract specialist after the benchmark demonstrations that "price [would] now determine" the winner of this competition. The agency denied that such advice was given. In light of the resolution of the protest, GAO did not resolve this factual dispute or the other protest grounds raised by COMARK.

\2 The modification to this provision introduced by Federal Acquisition Circular (FAC) 97-01 deleted the reference in this paragraph to "lowest overall cost." This modification (which, in any event, was not yet in effect when the RFQ at issue in this protest was issued) would not change the analysis. GAO noted; however, that the requirement that FSS purchases, in order to be exempt from the mandate for full and open competition, be made at the "lowest overall cost" has a statutory basis, and thus cannot be removed by a modification to the regulation. 41 U.S.C. § 259(b)(3)(B) (1994).

\3 FAC 97-01 slightly reworded the provision, but without changing its meaning in a way relevant here, and shifted its location to FAR § 8.404(b)(2)(i).

\4 The same may apply for furniture, another area where schedules are widely used. See, e.g., Design Contempo, Inc., B-270483, Mar. 12, 1996, 96-1 CPD ¶ 146.

\5 Where an agency uses the RFQ simply to request price quotations for items identified by the agency (for example, where the agency is seeking a price reduction), the concern discussed here does not arise, since the agency is asking the vendors only to quote prices, not to choose the items on which to quote. See FAR § 8.404(b)(3) (FAC 97-01) (agency shall generally seek price reductions where the value of the purchase exceeds the maximum order threshold).

\6 While the hard drive benchmark tested by the protester did not have a [deleted] GB capacity, there was apparently no requirement that vendors quote configurations that had been benchmark tested. Similarly, the protester contends that it could offer, apparently through its FSS contract, the chipset that the agency preferred.

\7 The agency argues that, since the protester did not submit the lowest technically acceptable quotation, it is not an interested party for purposes of pursuing this protest. (The protester contends that the only quote which was lower than its own was ineligible for selection.) Since the agency's needs were apparently not for the low-priced, technically acceptable solution and we are recommending that the agency amend the solicitation accordingly, we conclude that the protester is an interested party. See 4 C.F.R. § 21.0(a).

SCIENTECH, Inc.
B-277805.2
January 20, 1998

DOCUMENT FOR PUBLIC RELEASE

The decision issued was subject to a GAO Protective Order. This redacted version has been approved for public release.

DIGEST

Agency's exclusion of the protester's proposal from the competitive range was unreasonable where: (1) the protester's proposal was considered technically acceptable overall and on each evaluation factor, and it had no perceived deficiencies; (2) the past performance/customer satisfaction evaluation did not consider the fact that the protester and its proposed subcontractor were incumbent contractors, performing the same or very similar work for the same contracting activity and the protester had received excellent performance ratings; and (3) the agency did not consider price or cost in determining the competitive range.

DECISION

SCIENTECH, Inc., protested the Department of Energy's (DOE) decision to exclude it from the competitive range established under request for proposals for advisory and assistance support services in support of DOE's Idaho Operations Office (DOE-ID). The protester contends that DOE's evaluation of proposals was unreasonable and that its proposal was improperly excluded from the competitive range.

Protest sustained

The protest was sustained because DOE, in making its competitive range determination, unreasonably failed to consider cost or price as well as significant relevant past performance information that was highlighted in SCIENTECH's proposal.

Issued on March 31, 1997, the RFP contemplated award of three to five indefinite delivery, indefinite quantity, cost reimbursement contracts to replace several expiring advisory and assistance support services contracts.\1 Each contract would be for a period of 5 years, would include cost-plus-fixed-fee and cost-plus-incentive-fee pricing provisions, and would have a ceiling price of $25 million. The work would be performed in response to task orders issued by the contracting officer. The RFP required offers for services in two general areas--engineering/technical services and management/professional services. The RFP required offers to include ceiling rates for the proposed fees as well as ceilings for burdened labor rates for a large number of labor categories that might be used in performing the work.

Under the RFP's evaluation scheme, contracts were to be awarded to those offerors whose proposals were determined to be most advantageous after

evaluation of proposals on performance approach and cost/rate criteria. The performance approach criteria and their relative weights (in percentage terms) were: management approach (55 percent), past performance/experience (25 percent); and subcontracting approach (20 percent). The RFP stated that performance approach criteria would be given point scores and assigned adjectival ratings but the cost/rate criterion would not be point scored or adjectivally rated; instead, cost/rate proposals were to be evaluated for reasonableness and appropriateness of proposed rates. The RFP also stated that the performance approach criteria were considered significantly more important than the cost/rate criterion, but provided that, if the proposed rates of a higher-scored proposal were higher than other proposals being considered for award, the government would determine if the advantages of the higher-scored proposal were worth the additional rate costs. Twenty proposals were received by the May 28, 1997, due date for receipt of initial proposals. The source evaluation panel (SEP) evaluated initial proposals; overall technical scores ranged from a low of just [deleted] percent to a high of [deleted] percent. The SEP determined that 17 of the 20 initial proposals were acceptable. SCIENTECH's proposal was rated as acceptable overall, as well as on each of the three technical evaluation criteria, and was ranked [deleted] with an overall score of [deleted] percent.\2 The SEP was briefed by the DOE financial advisor, who evaluated cost/rate proposals for reasonableness, but did not compare or rank the offerors' proposed prices or labor rates. The SEP decided that there was a "natural, logical scoring break" between the seventh [deleted] and eighth [deleted] highest-rated offers and that offers rated at less than [deleted] did not have a reasonable chance for selection. Accordingly, the SEP, with the concurrence of the source selection official, included only the seven top-rated proposals in the competitive range and excluded SCIENTECH's lower-rated proposal. By letter of August 11, the contracting officer notified SCIENTECH of this determination.

After discussions were held with the competitive range offerors and best and final offers (BAFO) received and evaluated, by letter of September 26, 1997, DOE notified SCIENTECH that it had awarded four contracts pursuant to the RFP.\3 Shortly thereafter, on October 7, DOE debriefed SCIENTECH. This protest was filed within 5 days of the debriefing.

Basically, the protester contends that DOE's evaluation of its proposal was unreasonable; and, therefore, the competitive range determination, which was based upon that evaluation, was flawed. The protester contends that DOE's evaluation of SCIENTECH's and its proposed subcontractors' past performance and experience was unreasonable because DOE selected for evaluation only 4 of the 10 references that SCIENTECH included in its proposal. In this regard, SCIENTECH asserts that DOE unreasonably failed to consider SCIENTECH's performance as an incumbent contractor for DOE-ID for the exact same work that is being procured here and instead selected contracts that were smaller and less relevant to the present requirement than its incumbent contract. SCIENTECH also asserts that DOE unreasonably selected for evaluation a reference for only one of SCIENTECH's proposed subcontractors--a firm that had relatively little experience working for DOE-ID--and did not evaluate any of the references submitted for SCIENTECH's other proposed subcontractors, all of which have extensive relevant experience with DOE-ID. The protester also asserts that DOE failed to consider the relative proposed prices of the offers in making its competitive range determination. In this connection, SCIENTECH contends that, if DOE had considered relative proposed prices, then DOE could not reasonably have eliminated SCIENTECH's proposal, which included labor rates that were substantially lower than those of some of the competitive range offers, from the competitive range. Our examination of an agency's decision to exclude a proposal from the competitive range begins with the agency's evaluation of proposals. Techniarts Eng'g, B-271509, July 1, 1996, 96-2 CPD 1 at 3. In reviewing an agency's technical evaluation, we will not

reevaluate the proposals but will examine the record of the agency's evaluation to ensure that it was reasonable and in accord with stated evaluation criteria, and not in violation of procurement laws and regulations. Id. The competitive range consists of all proposals that have a reasonable chance of being selected for award. See Federal Acquisition Regulation (FAR) § 15.609(a) (June 1997).

The past performance/experience criterion was worth 25 percent of the total evaluation. Within past performance/experience, the RFP listed two subcriteria: relevant past performance (worth [deleted] evaluation points or [deleted] percent) and customer satisfaction (worth [deleted] evaluation points or [deleted] percent). For evaluation purposes, the RFP allowed offerors to submit no more than 10 references for the offeror and its subcontractors and to include specified information concerning current contracts and contracts completed in the last 3 years.\4 In evaluating proposals on the relevant past performance subcriterion, DOE reports that it evaluated all references contained in the proposal. However, in evaluating proposals on the customer satisfaction subcriterion, DOE sent questionnaires to some, but not all, of the references. In most cases, DOE evaluated responses (i.e., completed questionnaires) from cognizant contracting personnel concerning three previous contracts performed by the offeror and just one response concerning a previous contract performed by a proposed teaming subcontractor. Examination of SCIENTECH's proposal shows that SCIENTECH's incumbent DOE-ID contract was the focal point of the past performance/experience section of SCIENTECH's technical proposal. The proposal highlighted the incumbent contract in several ways. For example, whenever the proposal listed previous projects, the incumbent contract was listed first. SCIENTECH's proposal also included one entire page that consisted of a table dedicated exclusively to showing that the work performed by SCIENTECH under its incumbent DOE-ID contract encompassed the work required under the present RFP's statement of work. Most importantly, when SCIENTECH described its previous experience, the description of the incumbent contract was by far the most comprehensive, taking up a full 15 pages of the proposal, and the description began with the following statement:

This project is the key project that demonstrates SCIENTECH's capabilities and experience for DOE's Idaho Operations Office. SCIENTECH will build on its experience and successful performance of this project to provide a seamless continuation of superior quality, cost-effective support and services to DOE-ID. [Emphasis added.]

Thus, it should have been clear to DOE that SCIENTECH was relying heavily on its work as an incumbent DOE-ID contractor as the primary source to be used in the evaluation of its past performance.

DOE has provided no detailed explanation for its failure to solicit and evaluate a customer satisfaction questionnaire regarding SCIENTECH's incumbent contract. In its report on the protest, DOE offered only a general explanation stating that some references provided by offerors created a potential for unreliable evaluation of past performance and some were older contracts or were less relevant. DOE also argued that there is no requirement that all references listed in a proposal be checked by the agency.

While there is no legal requirement that all past performance references be included in a valid review of past performance, some information is simply too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain and consider the information. International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5-6. In our opinion, the agency's failure to evaluate SCIENTECH's work as incumbent in the current case was patently unfair to the protester. Not only did SCIENTECH

emphasize the importance of its experience as incumbent in its proposal, but our review of the statements of work for the incumbent contract and the current RFP confirms that the work required under the new contract is strikingly similar to the work required under the old contract. Apparently, DOE also believed that SCIENTECH's incumbent contract and the current RFP contained very similar statements of work, because the RFP specifically listed SCIENTECH's incumbent DOE-ID contract as "a representative sample of the broad scope of work included in the incumbent contracts." Additionally, the record shows that SCIENTECH's incumbent contract and the new contracts are indefinite quantity contracts, the incumbent contract has incurred roughly $15 million in work so far while the new contracts are capped at $25 million, and SCIENTECH is still performing work under the incumbent contract. It is difficult to imagine a prior contract experience that is more relevant to the current procurement in terms of the same contracting activity, similarity of the scope of work, similarity of contract size and type, and recent performance. Id. at 4-6. Accordingly, we think it was unreasonable for DOE not to evaluate SCIENTECH's incumbent contract when evaluating the customer satisfaction subcriterion.

SCIENTECH also contends that DOE unreasonably selected for customer satisfaction evaluation the only subcontractor listed in SCIENTECH's proposal that had relatively little experience with DOE-ID instead of one of its other proposed subcontractors, all of which have had extensive experience with DOE-ID. Since DOE's report contained only a general statement about how some references were considered more relevant than others and did not specifically respond to the protest allegation, we do not know how or why the SEP selected the one subcontractor reference for evaluation. We note, however, that one of SCIENTECH's proposed subcontractors, Halliburton NUS Corporation, was an incumbent contractor performing this same work under its contract--valued at roughly $7 million--with DOE-ID. Notwithstanding the fact that SCIENTECH's proposal listed this subcontractor as one of its references and that the RFP also listed this contractor's incumbent contract as a representative sample of the scope of work performed by the incumbent contractors, the SEP chose not to evaluate this subcontractor reference. Because this reference was an incumbent contractor providing technical and management support services to DOE-ID under a contract that was considerably more than RFP's $2 million threshold for purposes of inclusion in the evaluation, we think that DOE also should have evaluated the clearly relevant contract. Id.

SCIENTECH states that it has consistently received "excellent" ratings from DOE-ID contracting personnel for its work under the incumbent contract and has submitted a contractor performance report showing an excellent overall rating for the 1-year period ending on April 30, 1997. DOE has not refuted SCIENTECH's statement or provided any evidence to the contrary. Therefore, we think it likely that SCIENTECH would have received very good or even excellent ratings from cognizant contracting personnel if a customer satisfaction questionnaire were solicited and evaluated.

Additionally, SCIENTECH's initial proposal received an overall acceptable rating of [deleted] percent while the lowest-rated competitive range proposal received an acceptable rating of [deleted] percent. If SCIENTECH's proposal were to receive a perfect score on customer satisfaction, SCIENTECH's overall rating would increase to [deleted] percent, just [deleted] percent less than the lowest-rated competitive range proposal, and would be ranked {deleted] out of 20 proposals, instead of [deleted] as originally ranked. SCIENTECH's proposal did not have to displace the seventh ranked offer in the evaluation ranking in order to be included in the competitive range; instead, the competitive range, which was established based on a break or gap in scores, could have been determined to include SCIENTECH's proposal, whose score, as adjusted, would have fallen within what had been a gap. In view of the fact

that SCIENTECH's proposal was rated as acceptable on every evaluation factor, and because the record shows that SCIENTECH's proposal had no deficiencies and received the same overall "acceptable" rating as the proposals that were included in the competitive range, we have no reason to believe that the SEP would not have included SCIENTECH's [deleted]-ranked proposal in the competitive range. This is especially so since the RFP contemplated that as many as five contracts would be awarded.
The likelihood that SCIENTECH would have been included in the competitive range is strengthened by the fact that the SEP failed to consider the offers' relative costs when making the competitive range determination.\5 While a technically acceptable proposal may be eliminated where it does not have a reasonable chance for award, Techniarts Eng'g, supra, at 3-4, FAR § 15.609(a) requires that the competitive range be determined on the basis of cost or price as well as other factors that were stated in the solicitation and that, when there is doubt as to whether a proposal has a reasonable chance of being selected for award, the proposal should be included in the competitive range. Cost or price must be considered as a factor; it is improper to exclude an offeror from the competitive range solely on the basis of technical considerations, unless the proposal is technically unacceptable. S&M Property Management, B-243051, June 28, 1991, 91-1 CPD ¶ 615 at 4; HCA Gov't Servs., Inc., B-224434, Nov. 25, 1986, 86-2 CPD ¶ 611 at 3-4.

The failure to consider cost in competitive range and award decisions is improper. Agencies must consider cost to the government in evaluating competing proposals. 41 U.S.C. § 253a(b)(1) (1994). Agencies have considerable discretion in determining the appropriate method for taking cost into account; they do not have discretion, however, not to consider cost at all, as happened here. Health Servs. Int'l, Inc.; Apex Envtl., Inc., B-247433, B-247433.2, June 5, 1992, 92-1 CPD ¶ 493 at 4.

The record shows that cost/rate proposals were evaluated for reasonableness, but no comparison of the offers' costs was made as part of the competitive range determination. This was apparently because the SEP was unable to develop most probable cost estimates for the competing proposals, since, as the SEP noted, the RFP did not include what the SEP referred to as "artificial methods" such as sample tasks or estimates of the quantities of labor hours to be ordered under each labor category.

While we understand that it is somewhat artificial to use hypothetical sample tasks in a solicitation for an indefinite delivery, indefinite quantity contract, where the actual work will be competed through task orders, sample tasks permit the government to assess the probable cost of competing offerors in light of both the offerors' differing technical approaches and their labor rates and fees. As an alternative, an agency may simply multiply offerors' proposed labor rates by estimated quantities of labor hours for each labor category (such estimates may be based, for example, on the agency's recent experience); that method, while simpler, does not take into account differences in offerors' technical approaches. See id.

DOE argues that SCIENTECH suffered no competitive prejudice from the agency's failure to consider cost in the competitive range determination. In support of this argument, DOE points to a summary document, created in response to the protest, which compares SCIENTECH's labor rates and fee ceiling to the labor rates and fee ceiling of the seven competitive range proposals. DOE contends that this comparison shows that SCIENTECH's proposed labor rates and fee ceiling are at best comparable to those contained in the competitive range offers and that in many cases the competitive range offers' labor rates and fee ceilings are lower than SCIENTECH's. In light of this, and since SCIENTECH's overall technical rating was lower than those of the competitive

range offers, the agency contends that SCIENTECH's proposal would not have been included in the competitive range even if cost had been considered.

The agency's summary document, which is limited to comparing labor rates and fees, is not helpful, since it fails to take into account the different quantities of the various labor categories that the agency expects to use. See Temps & Co., 65 Comp. Gen. 640, 642 (1986), 86-1 CPD ¶ 535 at 4. Moreover, the agency's labor rate/fee ceiling summary supports our conclusion that SCIENTECH did in fact suffer prejudice from the agency's failure to take cost or price into account in the competitive range determination. Specifically, DOE's summary shows that the competitive range offers' proposed fee ceilings ranged from [deleted] percent, while SCIENTECH proposed a sliding fee scale ranging from [deleted] percent depending on the complexity of the work. Thus, it appears that SCIENTECH's fee ceiling was low relative to the range of fee ceilings in the competitive range offers. Furthermore, while DOE points out that SCIENTECH's average labor rates are not the lowest for any particular labor category, the agency's summary reveals that, SCIENTECH's labor rates are lower than the [deleted]-ranked competitive range proposal's rates in the great majority of labor categories (19 of the 24 categories represented). While these comparisons cannot substitute for an adequate cost analysis, they undercut the agency's contention that the lack of such an analysis did not prejudice the protester. For the reasons set forth above, we sustain the protest. Since DOE has suspended performance under the contracts, we recommend that DOE include SCIENTECH's proposal in the competitive range, hold discussions with SCIENTECH concerning the various weaknesses perceived by the SEP in SCIENTECH's proposal, and solicit a BAFO from SCIENTECH. After SCIENTECH's BAFO is evaluated, DOE should make a new source selection decision consistent with this decision.\6 Because we are sustaining the protest, it is not necessary for us to address SCIENTECH's protest grounds concerning the SEP's downgrading of SCIENTECH's proposal, as those issues can be addressed by the agency during discussions. We also recommend that SCIENTECH be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1997). SCIENTECH should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1). Comptroller General of the United States

NOTES

\1 The agency reports that the procurement was conducted to replace five expiring incumbent contracts. The RFP, however, listed seven incumbent contracts, including a contract between DOE and SCIENTECH.

\2 In accord with the agency's source selection plan, ratings in the [deleted] percent range were considered satisfactory.

\3 Contracts were awarded to Ecology & Environmental, Inc.; Global Technologies, Inc.; Los Alamos Technical Associates, Inc.; and Systematic Management Services, Inc. Performance under all four contracts has been stayed pending our resolution of this protest.

\4 As used in this RFP, a reference actually included a brief description of the contractor's or its proposed teaming subcontractor's prior contract (including, among other things, the dollar value, the type of work performed, and performance difficulties), as well as points of contact to whom DOE could send customer satisfaction questionnaires.

\5 We note that most of the other perceived weaknesses in the protester's proposal were informational in nature and could have easily been remedied through discussions. This applies to the weaknesses upon which the protest

was based, namely, that: [deleted]. We thus find unreasonable the agency's conclusions that the weaknesses the SEP perceived in SCIENTECH's proposal were so extensive that the proposal would have to be rewritten or that discussions about those weaknesses would necessarily lead to technical leveling.

\6 Instead of including the protester's proposal in the competitive range and soliciting a BAFO from that firm, the agency may decide, in the alternative, to amend the RFP to add an explanation of the cost evaluation and then to solicit revised proposals from all offerors. However, since no offeror has contested the lack of such an explanation in the solicitation, the agency may elect to proceed with its cost analysis based on its internal calculations of the estimated quantities of labor hours to be ordered.